

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS  
CODE, R.S.O. 1980, CHAPTER 340, AS AMENDED;

AND, IN THE MATTER OF THE COMPLAINT MADE  
BY KEN MORIN, DATED MARCH 8, 1985, ALLEGING  
DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF  
AGE AND MARITAL STATUS AGAINST NORANDA INC.  
AND I.G. BARRIE, HEMLO PROJECT

**FINAL AWARD**

Board of Inquiry: Dr. D.J. Baum

**Appearances:**

**Noranda Inc. -**

R.J. Drmaj, Counsel  
K.G. Hughes, Counsel

**Commission -**

Michael Fleishman, Counsel

**Mr. Barrie, *pro se***

**Mr. Morin, *pro se***

**Hearings:** April 11, May 10, July 25 and 28, 1988; January 18, 19, and 20,  
at Toronto, Ontario

## I The Complaint

There are a few preliminary matters to be discussed before proceeding to the gravamen of the Complaint. The first relates to the nature of the practices challenged by the Commission. The second is concerned with preliminary objections going to a claim of delay raised by the Respondents.

The Complaint alleges discrimination in employment on the bases of marital status and age within the meaning of sections 4(1) and 8 of the *Human Rights Code*. The thrust of the Commission's case, however, was directed toward actual and constructive discrimination in employment on the basis of age. There was little said about discrimination on the basis of marital status. The only evidence presented by the Commission on this point related to its proof of constructive discrimination and more particularly Exhibit 22. Though more will be said of this later in the Award, the Commission proved that of the eight employment positions questioned, four were offered to young men, three of whom *incidentally* were single. The Complainant, Mr. Morin, is married. Little else was presented by the Commission about marital status as a ground for discrimination. Accordingly, at this point I dismiss that aspect of the Complaint.

Next, there is the question of delay raised at the start of this proceeding by Mr. Drmaj. In an Interim Award issued on May 25, 1988, I found that there had indeed been undue delay in bringing forward the Complaint. However, I refused to dismiss the Complaint. Rather, I said that I would consider that delay in the contexts of (a) any inability on the part of the Respondents to defend themselves; and (b) in fashioning an appropriate remedy should the Complaint be sustained in whole or in part. In this regard, I note that Mr. Fleishman, Commission Counsel, accepted this approach:

THE CHAIRMAN: Do you agree . . . that delay can be taken into account in terms of credibility of evidence, and in terms of remedy?

MR. FLEISHMAN: I do, Mr. Chairman, and I think that's the proper place for that consideration to be made. Indeed, in my correspondence to the Respondent, which my friend has included at Tab 10 of the material, which is dated October 14, 1987, I

state that the Board of Inquiry may consider the issue of the alleged delay, and any consequences thereof at the hearing.

I believe it is fair to say that the Respondents have not been disadvantaged in meeting the Commission's case because of the delay. (This is not to deny any inconvenience, or even added expense they might have suffered.) In no instance did I find that that delay resulted in either the inability of Respondents to present documentary evidence or to recall salient facts in their testimony.

Yet, in saying this, I have drawn a line between failed memory resulting from the passage of time, and forgetfulness that has nothing to do with delay in bringing this Complaint. This point is particularly relevant to that aspect of the Award going to the purported reason for not hiring Mr. Morin, according to the testimony of Mr. Barrie. There, forgetfulness will be found to reflect on credibility.

## II Findings

### Background

At the time relevant to this Complaint, Mr. Morin was 44 years old and married; he lived with his wife at Elliot Lake in Northern Ontario. Mr. Morin had had a varied and rich career in law enforcement, security, mine site protection, including fire protection. In 1960, he was commissioned in the R.C.A.F. Primary Reserve as a pilot officer. In 1963, he became a fire-fighter with the Elliot Lake Volunteer Fire Department. In 1964, he began service as a police constable with the Ontario Provincial Police (OPP). He was stationed in Northern Ontario in North Bay, Mattawa and Still River.

On the face of his resume, it is clear that Mr. Morin was a person who took initiatives beyond the limited duties of his assigned job: During the period that he was an OPP constable, he was named deputy chief of the Mattawa Volunteer Fire Department. He was a part-time teaching master at Canadore College, North Bay (1976-1978) where he offered instruction in bush survival. And, at the OPP, he developed specialty skills as a breathalyser technician and in ground search and rescue. Mr. Morin left the OPP of his own volition in 1978 to assume general police duties with the Elliot Lake Police force.

In 1980 he applied for and received the position of Chief Security Officer with the Construction Department of Rio Algom Limited. It was understood at the time of hiring that the position was for a limited time. A uranium mine constructed in the 1950s was to have been rehabilitated at considerable expense (about \$300 million). James Rudack, then program manager for capital projects for Rio Algom (and at the time of the hearing in this matter, President of the Sault Ste. Marie Economic Development Corporation), interviewed, hired and supervised Mr. Morin. His description and evaluation of Mr. Morin's work was that of a person who took initiative in a job demanding substantial responsibility, and in doing so exercised leadership on those he supervised and cooperation with other supervisors who functioned essentially as a team:

Q. What were Mr. Morin's responsibilities?

A. Mr. Morin was responsible for security of the . . . capital projects we were carrying on [at] Rio Algom. The project, at that time, was worth in excess of a third of a billion dollars, and he was responsible for the security of the construction projects, . . . for the fire and safety on the project.

Q. And you were his supervisor?

A. I was his supervisor. He reported to me in that respect.

Q. Did you have the opportunity to observe or evaluate his performance?

A. Oh, absolutely, He was saving my neck from having a serious fire like our colleague company down the road, Denison Mines, for one thing. He was also protecting me and the security of the project. . . . His performance [was] first class. He was thoroughly professional, knew his job and very much dedicated to the work at hand. I thought so much of him that I sent him to school to broaden his knowledge in fire protection, industrial fire protection in carcinogenics . . . at Texas A & M . . . I had occasion to speak to the director of the course and he [Mr. Morin] was one of the top of his class. They're all professional in that class, by the way.

Q. Did Mr. Morin supervise any employees?

A. . . [D]epending on what we were doing at the time . . . maybe up to 30 to 35 people. He was responsible for all the fire guards when we were doing rubber lining in the chemicals that were being handled . . . and the fire guards all responded to him through some supervisors that he had. He also had the security of the gates and he had the safety of the personnel on the project.

Q. How did he get along with his co-workers?

A. I think he got along real well. Everybody on my team got along well. I had a team; I didn't have an individual star . . . and he was very much a part of the team.

Q. Did he have to deal with the public . . . ?

A. Yes, he did. He had a relationship with the contractors . . . on the project . . . He also did the inter-relationship with the city fire department [the Town of Elliot Lake Fire Department] who also were responsible to provide us with . . . fire protection if we got into a serious fire . . . and with police and ambulance protection if we had an . . . incident. He got along real well with the people he was dealing with.

Roger Thibeault, at the relevant time Canadian Safety Director for C.H. Heist Co., a contractor at the Rio Algom mine site, testified concerning what appeared to be a key ingredient in the cooperative attitude on the part of those who worked for Mr. Morin, and those who had to follow safety rules he laid down. (In this regard, it should be noted that Mr. Thibeault, as part of his job, had to make regular visits to the mine site.):

Q. How would you describe his [Mr. Morin's] performance?

A. The word that comes to mind was phenomenal. His expertise was unbelievable. . . .

In having the knowledge with regard to safety and security on the site and letting people know what had to be done . . . Mr. Morin was very capable of handling the job and it showed well. The men respected him. They had a good rapport with him. And the other job sites, or the other contractors that we had visited, showed respect. All the workers, they showed respect for the

man.

Control flowed from the respect in which he was held by those he supervised. This was clearly observed by Donald Stewart, Chief of the Elliot Lake Fire Department. In cross-examination by Mr. Drmaj, Chief Stewart stated:

Q. . . . With interest I note, Mr. Stewart, when you were describing your work and your relationship with Mr. Morin . . . the word you used frequently is "control" . . . You say he controlled his men. He controlled where things were. Can he control his men very well?

A. That's correct sir.

Q. The men respected him; they said, "Yes, sir. No, sir." It was the type of control one would expect in a professional army, fire fighters, policemen?

A. Yes, sir. The fire fighter field is a para-military type of organization as it is. It has to have that respect and [it] has to have that control to get things done.

Q. Would you agree if you needed one word to describe Mr. Morin and his work, it would be the control?

A. He would be the person in charge, yes, sir.

In re-direct examination, Mr. Fleishman asked Chief Stewart to expand somewhat on the meaning of "control" as applied by Mr. Morin:

A. If I can explain the word, "control," it is that in a fire scene you have to have one person . . . in charge. That person . . . would allocate the direction as to how he wants the fire or the situation to be stopped. . . . You have to have control of that particular scene and Mr. Morin always seemed to have that control.

. . . [T]he men were always there ready for his direction, ready for him to say where [he] wanted [them] to go . . . We found out they were well trained. So . . . they were anticipating his next move. They would anticipate that and that's a sign of . . . somebody

that is in control.

I know my firefighters anticipate what I'm going to do, but they wait for me to go ahead and issue that order before they go ahead and do it . . .

[T]hat's the type of . . . situation that Mr. Morin had. . . . I never saw any griping against him. [Those working for him] were always willing to do things for him, to go that little extra mile. . . . To show you, he had the organization [in the area] of the Terry Fox Run [and] the Jaws of Life.

It was his men . . . out there volunteering their time to . . . do these things. And they were always assisting us and they were always coming in on their own time to learn additional things for fire fighting.

This is a sign of somebody that's in charge of an area that has got control over the whole area.

In the result, what emerges from this background statement is a profile of Mr. Morin: At the relevant time, he was a person with a varied, and deep experience in the area of mine safety, security and fire protection. He was used to substantial responsibility. He took initiatives in his job. He had the respect of those who worked for him, and, in that regard, he took control when needed.

### Job Search

Work at the Rio Algom construction site came to an end in 1983. Mr. Rudack, manager of the construction site, had thirty-seven employees, whom he considered his "right hand," that is, individuals who had helped to make the project a "success." He wanted to assist them in finding new employment. Toward that end, he retained a consultant and established a programme to aid the job search. Mr. Morin was one of the thirty-seven employees invited to participate in the programme. Mr. Morin took advantage of the opportunity, and, in that regard, he was told that he had the right to give Mr. Rudack as a reference for any potential employer.

Mr. Morin's job search for a position in the area of security and site protection, including fire protection, did not result in any offers of

employment. He had sent about forty resumes to possible employers in response to advertisements and on his own initiative. Though some of the resumes brought interviews, none resulted in job offers. On balance, it is fair to say that Mr. Morin was neither unduly discouraged nor depressed. Rather, he continued in a determined way to seek work.

This is not to say that on occasion he was not disappointed. Chief Stewart of the Elliot Lake Fire Department, mentioned earlier, had developed an ongoing relationship with Mr. Morin. Chief Stewart testified about one such job disappointment: Mr. Morin had applied for the position of Fire Chief in Manitouwadge, also located in Northern Ontario. Mr. Morin was one of two final candidates. He didn't get the job, said Chief Stewart, because Mr. Morin "had no municipal background and Ken [Morin] knew that."

Q. . . . [D]id you notice any reaction [by Mr. Morin to the rejection]?

A. No, because he could understand why he was rejected. I mean there was a reason for it. There was a definite reason why he didn't get hired on . . . .

One of the letters seeking employment was sent by Mr. Morin to Noranda Mines Ltd. in 1983. The letter made specific reference to the Hemlo Project of Noranda, located in Marathon, Ontario. L.R. Highcock, Project Personnel Superintendent, replied to Mr. Morin by letter dated October 17, 1983:

Thank you for your letter of inquiry regarding employment possibilities with the Hemlo Project.

After careful review and consideration of your training and work experience, we must advise that we are unable to offer you consideration for employment at this time. We will however, retain your resume on file for consideration in the future as our needs change and/or expand.

Thank you for your interest in the Noranda Mines Limited, Hemlo Project.

(Another letter, stating essentially the same thing, but related to work with mining construction companies at Hemlo was sent by Mr. Highcock on January 5, 1984.)

About nine months, later Noranda advertised in *The Globe and Mail* for the position of security co-ordinator for the Hemlo Project. The advertisement, requiring an answer to Mr. Highcock, stated:

Noranda is searching for an experienced Security Co-ordinator for our new gold mine in Northwestern Ontario.

You will have several years of progressively responsible experience in the field of industrial and corporate security or related fields, as well as a demonstrated ability to interact with various law enforcement agencies.

Proven leadership ability and management skills are essential. You must also be capable of advising management on pro-active security measures in the areas of loss prevention.

As the successful candidate, you will have the opportunity to assemble a strong security support team and be an active participant in security procedures development.

Mr. Morin applied for the job. On August 8, 1984, Mr. Highcock replied to Mr. Morin rejecting his application but, at the same time, offering to consider him for "security positions remaining to be filled," should Mr. Morin agree. The letter stated:

Thank you for your resume in response to our recent advertisement for the position of Security Co-ordinator for Noranda Inc., Hemlo Division.

After careful review, consideration and discussion, our Review and Selection Committee feels that your training and experience are not entirely in harmony with our current need. As a result of this assessment, we are unable to give further consideration to your resume at this time. However, if your qualifications are more in harmony with the security positions remaining to be considered, we would review your resume again at that time. Please advise me of your wish to continue to be considered.

Thank you for your interest in this career opportunity and in Noranda Inc., Hemlo Division.

(Mr. Morin answered the letter. He said that he did indeed want to be considered for any other security position.)

## Hiring the Security Staff for the Hemlo Division

### Selecting Candidates

Glen Barrie, a Respondent in this matter, was awarded the position of security co-ordinator. Mr. Barrie, a twenty-two year veteran of the Royal Canadian Mounted Police before his retirement, had also worked as a security co-ordinator for another mining company. It is noted and emphasized that the complaint in this matter does not question Noranda's decision to award the position of security co-ordinator to Mr. Barrie.

When Mr. Barrie assumed his duties at the end of November 1984, construction of the mine site had nearly been completed. He began a search for candidates to fill eight positions as security personnel. It had been determined that two security officers would be on duty for each twelve-hour shift. Mr. Barrie stated:

The concept was that one [security officer] would be making the rounds of the site and being visible and the other person would remain in the security control centre, which we call the gatehouse, for the purpose of monitoring vehicles coming back and forth from the site and persons coming to the site itself, to monitor the closed circuit television system.

To find a pool of qualified applicants, Mr. Barrie, operating under instructions about which more will shortly be said, had two sources: (1) There were applications such as that of Mr. Morin of those who had applied for the position of security co-ordinator. (2) There were individuals still at the site, employed to aid in the construction of the mine, whom Mr. Barrie had had the opportunity to observe.

Mr. Morin was one of those selected from the first source of candidates. In that regard, Mr. Barrie contacted the references listed by Mr. Morin in his resume. They included Mr. Rudack, Mr. Thibeault, Mr. Stewart and J. Tyrrell, Chief Electrician at Rio Algom, Quirke Mine, Elliott Lake. Having satisfied himself that the references were indeed favourable and that, on the face of the resume, Mr. Morin seemed a good *prospect* as a candidate, only then did Mr. Barrie telephone Mr. Morin on or about December 19, 1984.

The purpose of the call was to invite Mr. Morin and his wife to visit the community and the mine site. Though Mr. Morin, aware that his references had been checked and conscious of his skills, thought the call was tantamount to an offer of employment pending certain *pro forma* conditions such as being interviewed and finding company housing to his satisfaction, I am convinced that this was *not* the case. Rather, I accept the evidence of Mr. Barrie: Mr. Morin, if the invitation were accepted, was to undergo an interview process from which a decision was to have been made concerning any job offer. However, this is not to deny Mr. Morin's claim that the nature of the job, salary ranges and details relating to housing were discussed in the telephone conversation.

In point of fact, Mr. Morin was to be put through the same interview process as other candidates. Among those candidates were four whom Mr. Barrie had selected from eight employees already at the site and involved in the construction phase of the mine.

In the result, Mr. Morin accepted the invitation to visit Hemlo, to be interviewed and to inspect available company housing for the successful candidate. The visit took place on January 9, 1985.

#### Decision-Making Concerning Job Applicants

It is clear that Mr. Morin's contact with the Company concerning available security staff positions was Mr. Barrie. It is also clear that Mr. Barrie operated under criteria established by Mr. Leathley, Maintenance Manager of Hemlo Division. To illustrate, Mr. Leathley testified concerning his role as to the sources of job candidates:

A. Well, as I recall within the applications that we had, we also had these eight people who were temporary Noranda Construction people of whom I had knowledge and felt that they should be considered.

I cannot remember whether Mr. Barrie was involved. I think he was. We went through the eight people that were there and looked at their applications. We studied their performance. I remember Roulston, Legacy, Perron and Merritt were four people of the eight that we decided should be interviewed and should be given a chance to compete with other applicants. At the same time were other applications and we made the decision that on

the experience and background of the applications that we had we would call them in. It was not set out that any of these people would either take the job or when interviewed that we would all agree that they could join us.

Once the criteria for employment had been established, there was the matter of implementation. Mr. Barrie understood his role in the hiring process: If Mr. Leathley rejected a candidate, that person was not to be offered a position. If, however, Mr. Leathley did not reject the candidate, but evidenced some concerns, Mr. Barrie had the authority to make his own choice. Mr. Barrie testified:

THE CHAIRMAN: . . . I thought I heard you say that if Mr. Leathley felt, whatever his reason might have been, that he did not think Mr. Morin should be hired that you would not have hired him.

THE WITNESS: That is correct.

THE CHAIRMAN: [On the other hand,] if there had not been any negative aspect to the followup checks, you would have hired Mr. Morin.

THE WITNESS: Correct also.

THE CHAIRMAN: How do you square the two?

THE WITNESS: I do not think that because Mr. Leathley said that Mr. Morin was somewhat authoritarian, I do not think he meant not to hire him, not to offer him employment.

Yet to say that Mr. Barrie had the authority to hire where only concerns were voiced by Mr. Leathley is not to imply that such power was exercised. Indeed, from the evidence quite the opposite was true. I believe that Mr. Barrie took his signals from Mr. Leathley in all material respects. In so stating, I do not fault Mr. Barrie for doing this. Rather, the points are that (1) It was Mr. Leathley who effectively decided whether offers of employment were to be forthcoming in selected matters. (2) Mr. Barrie sometimes helped to input into those decisions. In other respects, however, Mr. Barrie was an instrument or means to implement decisions made by Mr. Leathley.

For example, consider Roger Perron, one of the four employees on the

construction phase at Helmo and singled out for the interview process and compare him with Mr. Morin. The very characteristics which caused Mr. Barrie to note as a candidate's weak points were seen in exactly the opposite manner by Mr. Leathley. Mr. Barrie seemed to want candidates who were aggressive and exuded an authoritarian air. Mr. Leathley saw these characteristics as weaknesses.

In the interview with Mr. Perron, Mr. Barrie, at most, gave him a marginally approved rating. He placed Mr. Perron in a category between meeting some but not all of the normal requirements for the position and meeting all the normal requirements for the position. As to Mr. Perron's weak points, Mr. Barrie stated "not very aggressive nor authoritarian - could be a little more aggressive - will need a lot of counselling. I think he is smart enough. However, he needs to be a little more aggressive in his approach."

In his interview with Mr. Perron, who eventually was hired, Mr. Leathley noted as a weak point that Mr. Perron was "very quiet." Nothing more was said in terms of the interview section concerned with comments and observations.

However, Mr. Morin was seen as "maybe still a policeman" by Mr. Leathley in his interview comments concerning Mr. Morin. And that meant too aggressive and authoritarian. In the interview section about Mr. Morin relating to comments and observations, Mr. Leathley wrote in part: "May be a little too regimented but appears acceptable."

These comments in fact were intended to mean Mr. Morin might be too "authoritative." Mr. Leathley had come to the conclusion at the end of the interview with Mr. Morin that he was suited for the job, except for the concern about authoritative demeanor. In Mr. Leathley's mind, this was a question that had to be answered, and gathering the information necessary to answering the question he left to others.

Mr. Leathley in his testimony indicated that all he did was to flag a concern. In this regard, Mr. Leathley said he left it to Mr. Barrie and Mr. Highcock to check in depth the references given by Mr. Morin and, in addition, to telephone a former employee of Noranda, Ray Rose, a person *not* mentioned in Mr. Morin's resume as a reference. (More will be said about Mr. Rose in the section of the Award dealing with decision made by Noranda - Hemlo Division not to hire Mr. Morin.)

I accept the fact that Mr. Leathley made the requests indicated. However, the requests were made in the context of a serious question concerning Mr. Morin which Mr. Leathley expressed to Messrs. Highcock and Barrie. The result was that Mr. Barrie effectively saw the decision as to whether to hire Mr. Morin taken from him. He saw this occur even though he was of the view, based on earlier reference checks and his own interview with Mr. Morin, that an offer of employment should have been made. Mr. Barrie testified:

Q. It appears to us that you did not agree with Mr. Leathley's assessment that the only shortcoming of Mr. Morin was this authoritative trait?

A. I did not feel in my own mind that Mr. Morin was too authoritarian.

Q. As I understand it from Mr. Leathley's testimony, which you heard, the decision whether to hire or not was relegated to you and Mr. Highcock. Is that correct?

A. *I do not think in this particular case it was.* (Emphasis added.)

I believe the evidence supports the conclusion that Mr. Leathley was the operative decision-maker in relation to the employment of Mr. Morin. This, however, is not to deny the fact that Mr. Barrie not only was privy to the decisions made, but that he also played a role in implementing those decisions.

Of course, Mr. Morin knew nothing about final responsibility for decision-making by officials at the Hemlo Division. He was aware only of Mr. Barrie as his first point of contact with Noranda, and he knew he would be subject, as a condition of employment, to successfully passing through a series of interviews.

### The Interview Process

In part, the interview process was discussed in the preceding section of the Award. Under this heading, I will set out my findings relating to the actual interview between Mr. Morin and Mr. Leathley.

As a prefatory note, as stated, Mr. Morin was invited by Mr. Barrie to visit

the mine site and to inspect available housing with his wife. Mr. and Mrs. Morin travelled by car to Manitouwadge. On January 9, 1985, at about 6 a.m., Mr. Morin was picked up at the motel where he and his wife were staying by Mr. Barrie who then drove about 55 km. to the mine site.

Mr. Morin's first interview was with Mr. Highcock and it lasted about thirty minutes. Toward the end of the interview, Mr. Highcock asked Mr. Morin to take a predictive index test which, in a rough sense, gives an indication of the individual's sense of self. The test took about five minutes.

The next interview was with Mr. Leathley. As with all of Mr. Morin's interviews at the Hemlo Division, each session was with the interviewer and Mr. Morin; it was a one-on-one situation only. The result is that I am left only with the recall of the two participants, aided to some extent in the case of Mr. Leathley by notes he took proximate to the time of interview.

It is fair to say that Mr. Morin found the interview with Mr. Leathley, in his words, "very disturbing." Mr. Morin testified:

Mr. Leathley appeared to have an antagonistic approach towards me in that after exchanging pleasantries, he started off with saying, "I don't normally hire ex-O.P.P. officers because they think that everyone is a crook."

I don't care for that attitude. I was a police officer. I am damn proud of it, and I don't like to be put down because of it. That is not my feeling towards human beings.

As a police officer, unfortunately we tend to deal a lot with the criminal element, but everyone in this world is not a criminal.

The interview then went on to highly personal areas. He wanted to know what happened to my pension money from the O.P.P. He wanted to know if I had a drinking problem. He wanted to know if my wife worked. He asked me my age.

And then there were other questions regarding whether I would be willing to, for example, shovel snow in the middle of a snow storm which I didn't find disturbing because it doesn't bother me to shovel snow. I come from Northern Ontario; I'm used to it.

And, generally the whole interview was . . . a situation where Mr. Leathley was trying to put me down.

For his part, Mr. Morin saw the interview as aggressive posturing on the part of Mr. Leathley. In direct examination, Mr. Leathley characterized his style of interviewing, both generally and as applied to Mr. Morin, as "assertive." In any event, both Mr. Morin and Mr. Leathley agree that the interview questions were forceful. Mr. Leathley testified:

Q. Mr. Morin in his examination in-chief described your interview with him as aggressive and negative. How would you deal with these terms?

A. Certainly, as I recall I would not say aggressive; I would say it was more assertive. I would not say negative. I had no negative feelings until I went through the areas and put the questions marked, but I do not think it was negative.

Three or four or five people all would have very different interviewing tactics. The task set before me was to try to get some indication as to how security people would react under certain circumstances, somebody going at them, saying what about this or what about that.

Mr. Leathley said that his concern was the operation of the mining operation as a whole. He wanted individuals who would fit into the group. In many ways, it can be said that he wanted precisely what Mr. Rudack, Mr. Morin's supervisor at Rio Algom demanded, namely, a team approach to mining operations. His way of finding acceptable employees, at least as far as security personnel were concerned, was to challenge them.

Without hesitation, Mr. Leathley in direct examination stated that (1) he might have asked whether Mrs. Morin would be working if a job were offered to Mr. Morin. "Sometimes it is difficult to get a job and that becomes a problem," said Mr. Leathley.

(2) More importantly, for our purposes, Mr. Leathley stated that he did make a direct enquiry concerning the age of Mr. Morin. In this regard, Mr. Leathley testified, again in his direct examination:

*The age, I looked at his resume and added up his years of*

*experience and said to him, this was in general conversation:  
Under the Human Rights Code you do not have to tell me your  
age, but you are probably roughly the same age as myself,  
looking at your experience . . .*

*Age is not the criterion. Experience was one of the criteria  
we looked at.*

Mr. Leathley did not tell Mr. Morin why a question was put concerning age. Nor did Mr. Leathley, even after the interview, tell Mr. Morin why a challenging posture had been taken during the interview. On the face of it, Mr. Morin had reason to be disturbed: An impermissible question concerning his age had been put to him, and the interviewer seemed bent on confrontation for reasons that were not explained.

Yet, when Mr. Leathley's actions following the interview are examined, *up to a point*, they seem consistent with his stated reasons: (1) He completed an interview form following his session with Mr. Morin. Under the section, "Candidate's strong points for this position," Mr. Leathley wrote: "Experience. Age. Wishes to settle. Seems keen on security [work]. Seems to have stable life." Under the interview form section, "Candidate's weak points for this position," Mr. Leathley wrote: "May still be a policeman." Under the section, "Additional comments and observations," Mr. Leathley wrote: "Please ensure good check done on references. May be a little too regimented, but appears acceptable. Check with Ray Rose. He knows him."

(2) Under the final category in the interview form of "Overall assessment," Mr. Leathley checked the classification: "Meets all normal requirements of the position." The first category of the form dealt with education under the heading "Can he do the job?" There, Mr. Leathley noted that Mr. Morin's qualifications exceeded job standards, the highest possible rating.

(3) In none of the eight specific categories of the interview form did Mr. Leathley give Mr. Morin what could be called a marginal rating. This contrasts sharply with Mr. Leathley's response to the interview he had with Mr. Perron, a person earlier referred to in this Award, who was interviewed less than a month after Mr. Morin and offered a lower-paying security officer's position with Helmo. *In the case of Mr. Perron, a lower rating was given in each of the eight categories either absolutely or by modification of the checked box.*

I find that for purposes of the *Human Rights Code*, Mr. Leathley did indeed ask an impermissible question concerning Mr. Morin's age. However, as Mr. Leathley demonstrated, the question was intended to reflect the experience of Mr. Morin. On balance, it must be said that that experience rating was quite high. This is not to say, however, that age was absent as a factor in the sum total of the employment decisions of security personnel.

### The Employment Decision

In the result, the decision was made by Mr. Leathley not to hire Mr. Morin. Mr. Leathley had asked Mr. Barrie and Mr. Highcock to recheck Mr. Morin's references and to telephone Ray Rose, a person not known to Mr. Morin. The purpose of the further inquiries was to determine only one question: Did Mr. Morin have a regimented or authoritarian character not in keeping with the corporate image intended for Hemlo?

According to Mr. Barrie, upon whom the task had fallen to make the necessary checks, there had been no clear rejection of Mr. Morin following his interview with Mr. Leathley. Rather, as stated, Mr. Barrie made the inquiries ordered.

It is at this point that the evidence of Mr. Leathley and especially Mr. Barrie must be characterized at best as unclear, and at worst as lacking credibility. There can be no doubt that Mr. Morin's references were impressive. They came from people who knew him well in the context of his professional work in the security area. And, they were people who themselves were highly skilled either in management or in the actual work of security, such as fire prevention.

Nothing in Mr. Barrie's testimony indicated that he had anything less than positive responses from Mr. Morin's references. (Indeed, this is confirmed by three of the references who gave testimony at the hearing.) Moreover, Mr. Barrie, himself, did not see Mr. Morin as too aggressive, a point that was made earlier in this Award.

Now consider Mr. Leathley's response to the inquiries he had ordered. He had asked for a specific question to be answered. According to Mr. Leathley, all that he got back was a general conclusion that Mr. Morin should not be hired. Mr. Leathley stated:

A. The guys came back [Messrs. Barrie and Highcock] and said I do not think we should hire him [Mr. Morin]. That is as far as I went. I raised the flag and Glen Barrie and Larry Highcock did the rest.

I did not check. I did not phone anybody. It was not my function to phone.

But what was the information that Mr. Barrie carried back to Mr. Leathley? Was it only the bald conclusion that Mr. Morin should not be hired? The evidence leads me to the finding that *no negative comment was in fact given by Mr. Barrie concerning Mr. Morin*.

Mr. Barrie was the only witness who recalled and spoke about the specific information that he allegedly provided Mr. Leathley. In this regard, I think it necessary to quote in full Mr. Barrie's testimony on this point. In doing this, it is important to recall that Mr. Barrie was clear that the decision not to hire Mr. Morin was not his; the matter had been taken from him by Mr. Leathley:

Q. How was it [the decision] made in this particular case?

A. As a result of Mr. Leathley telling me to go to do some more inquiries, that was the reason that he [Mr. Morin] was not hired. The result of these further inquiries was revealed to Mr. Leathley and Mr. Highcock and as a result of that Mr. Morin was not hired.

Q. Were these further inquiries made after Mr. Morin attended at the site?

A. That's correct.

Q. [Who is] Ray Rose?

A. He is on Mr. Leathley's interview sheet. He said check with Ray Rose who I checked with... [Rose is] a fellow who was formerly employed by Noranda two or three years prior to my working with them.

Q. Had he worked with Mr. Morin previously?

A. No, I do not believe so.

Q. Why was Ray Rose a person that you would check with?

A. He was a source of information and he in turn put me on to somebody else. I have no idea who the person was, but as a result of talking to Mr. Rose I then talked to somebody else ...

Q. Mr. Rose directed you to somebody else?

A. Correct.

Q. And you have no idea who that [person] was?

A. I have no idea, no.

Q. And that person gave you information ... ?

A. That person gave me information that as a result we decided not to employ Mr. Morin. That was the long and the short of it.

Q. What was the nature of that information?

A. It was with regard to his service as a policeman and his reason for termination as a policeman while employed with, I believe, either Elliot Lake or Kirkland Lake or Blind River, I am not too sure. But, it was while he was with the police force and it had to do with his reasons for termination from the police force.

Q. Was this person that you spoke with, do you know whether he had any role in that termination or just knowledge?

A. I think it was just knowledge that he had.

Q. You do not know where he got that knowledge?

A. I was led to believe that he was policeman and had at one time worked with Mr. Morin.

Q. I see. Did he play any decision-making role with regard to Mr.

Morin's leaving the police force, whichever police force he may have been involved with?

A. He may have been involved in an investigation, but I have no direct way of knowing.

Mr. Barrie could not be precise as to the information he was given concerning Mr. Morin. All that he could say was that it related to a matter of trust, which resulted in Mr. Morin being given the opportunity of leaving the force which then employed him, or being faced with court proceedings. In this regard, Mr. Morin was unable to name the police force.

At no point did Mr. Barrie know the identity of the person who allegedly gave him the information, which alone caused him to recommend rejection of an otherwise fully qualified candidate, a person who had been invited, along with his wife, to visit the mine site and inspect housing, and a person who quite clearly wanted a job as a member of the security team. Mr. Barrie stated: "It was not that I was trying to hide anybody's name because I do not honestly remember the name of the fellow I was talking to. *Even at that time I do not think I knew who it was. But I just never brought it up.*"

Bearing in mind just how far Mr. Morin had been moved along in the Hemlo selection process, it is difficult in the extreme to accept Mr. Barrie's account. At the very least, especially from a highly trained and experienced former RCMP officer, one would have expected a more detailed followup, or recollection of the details of the alleged breach of trust engaged in by Mr. Morin. Indeed, I am hard put to accept the fact that Mr. Barrie would not have, albeit in a general way, set out his concerns to Mr. Morin, and provided him the opportunity of making a response to an obviously serious charge, one tainted with moral turpitude.

Even more to the point, there is the testimony of Mr. Leathley: Not a word was uttered in direct testimony concerning the charge made against Mr. Morin. Mr. Leathley's entire concern about Mr. Morin centred on whether the candidate was an authoritarian person. There was no indication that he shifted ground in his reason for not employing Mr. Morin. Indeed, there is nothing in the testimony of Mr. Leathley to indicate that he even was aware of the charge made and allegedly brought to him by Mr. Barrie. Nor, I add, was any effort made following the testimony of Mr. Barrie, which came after that given by Mr. Leathley, to clarify what was a singular

omission: namely, the reason for not employing Mr. Morin.

Finally, I note, though the Respondents disputed the matter, at no point during the course of investigation leading to this complaint was the defence put forward that the reason for not hiring Mr. Morin related to the claims of an unidentified informant going to Mr. Morin's trustworthiness.

I am compelled to conclude that Mr. Morin was not rejected as a security officer at Hemlo on the ground that he had an authoritarian personality. I am left with the conclusion reached by Mr. Leathley at the end of his interview with Mr. Morin: The candidate was experienced and well-qualified for the listed eight positions as members of the Hemlo security team. Mr. Leathley had a concern about the possibility that Mr. Morin might have been authoritarian. Insofar as the *Human Rights Code* is involved, this certainly was a proper matter for management. However, the facts demonstrate that Mr. Leathley had a *question*. *He had not reached a conclusion about whether Mr. Morin was authoritarian. And, I find as a fact that that question was not addressed by Mr. Barrie.*

If Mr. Morin had the experience and in all other respects was qualified to do the job for which he was interviewed, why was the position not offered to him? The answer, in my view, is disclosed in what followed the interview by Mr. Leathley of Mr. Morin, how the decision not to hire Mr. Morin was explained to him, and what the Company did in fact in filling other positions for the security team.

I come now to the message that was communicated to Mr. Morin by Mr. Barrie concerning the decision not to hire him. (This took place in a telephone call made by Mr. Barrie to Mr. Morin on January 11, 1985, two days after the visit by Mr. Morin to the mine site at Hemlo.) In this regard, it is important to note again that, as applied to Mr. Morin, it was Mr. Barrie alone who was held out as the representative of the Company. What Mr. Barrie told Mr. Morin did not even hint at the possibility of employment rejection because of some breach of trust on the part of Mr. Morin. Rather, Mr. Barrie spoke of a decision not to hire Mr. Morin because he did not "fit into the concept of the Company's hiring policy." For reasons that follow, this aspect of Mr. Barrie's evidence does seem credible.

In cross-examination, Mr. Barrie was pressed as to the meaning of the Company's "hiring policy." What surfaced was a corporate decision to hire eight persons. Four of these individuals were to be experienced and four

were to be inexperienced. The four inexperienced were relatively young, ranging in age from 23 to 25. The four experienced persons ranged in age from 35 to 45. It is clear from Mr. Barrie's testimony that this decision was made *before Mr. Morin was interviewed*:

Q. Did you tell Mr. Morin that he was not compatible with the team, you know, the young guy-old guy routine?

A. I do not recall telling him [Mr. Morin] that. It is possible, yes. But, I do not specifically recall at any time telling Mr. Morin that he was too old for the position . . .

Mr. Barrie referred to the fact, mentioned above, that four Noranda employees hired during the construction phase of the mine, had been asked to submit applications for employment at Hemlo as members of the security team. They were: Lyle Merritt, Roger Perron, Cherie Legacy and Rick Roulston. Mr. Leathley emphasized that each of the four were subject to the full rigors of the job interview process, just as Mr. Morin, as a condition to being offered a job. Mr. Barrie testified:

Q. . . . What . . . does [the] "young guy-old guy routine" . . . mean?

A. I think in our hiring policy in having seen the four people . . . subsequently hired by Noranda, meaning Merritt, Perron, Legacy, and Roulston, they were young people, inexperienced but they did have knowledge of the work site. They had knowledge of most of the people that had been hired to date. Three of them had actually taken the security course, and one of them had been a policeman. And, Mr. Merritt had several years experience in security . . .

[I]t would have made sense to me to have taken these inexperienced people who were familiar with the site and team them up with experienced persons who would be hired.

Q. So you felt that before they were hired there was certainly an approach which would have paired these inexperienced people with more experienced people.

A. Yes. And, I discussed that with Mr. Morin.

Q. When did you discuss that?

A. While he was being interviewed.

Q. What did you tell him during the course of that discussion?

A. Basically that somebody like Mr. Morin who had experience would probably be teamed up with an inexperienced person such as, maybe, one of the ones that would be hopefully hired from the project.

In my view, this is precisely what Mr. Leathley did: Eight persons were hired for the security detail. Of the eight, four were experienced and older persons, very much as Mr. Leathley had described Mr. Morin. Their age range was from 36 to 45 and all were married. The remaining four members of the security team were young, ranging in age from 23 to 25, and at the time of interview they were all single.

The four inexperienced members were:

Roger Perron, age 24

Cherie Legacy, age 23

Rick Roulston, age 25

Bruce Nerpin, age 23

The four experienced members were teamed with four experienced security officers. The teams established were:

Mr. Hales, age 36, with Mr. Perron

Mr. Roy, age 45, with Ms. Legacy

Mr. Merritt, age 45, with Mr. Roulston

Mr. Depelteau, age 37, with Mr. Nerpin

Mr. Leathley insisted that the decision to team experienced and inexperienced staff came after the hiring process was completed. It was, he said, a common sense way of making efficient use of personnel. In the face of persistent cross-examination, Mr. Leathley held to this view. He testified:

Q. Now let's go back to the pairing. You say experience or inexperience was a factor in your consideration, the pairing of experience with inexperience?

A. You are asking me now once people were hired what we would

do with them. We would make the best use of them putting the experienced individual with the inexperienced individual. That was only sensible once they were hired.

Q. It was just coincidence that you happened to have four people who were inexperienced [and] then paired with the experienced?

A. It is not fair. I explained that we already had four individuals who were hired, who would transfer [from Noranda construction]. One was Merritt, and there was Legacy who had been with us a short time. Roulston had some experience, and the other one was Perron with some experience. At least two of these people, to my recollection, that is Legacy and Roulston, had gone through a security course in Thunder Bay College. Both of these people, therefore, had some background in the type of thing which we wanted to do. They did not have experience, but they were already with us. And, we knew them so we hired them, which we thought made a lot of sense.

*If we had people with twenty years' experience we would have been much happier... If it had been possible to hire all experienced people, I would think we would probably have gone for that.*

The fact is we already had in the construction area some people who were with Noranda who we felt we should discuss with them if they felt there were compatible and wanted to go for the long term. We felt we had an obligation to discuss with them whether we should hire them, or whether they fitted in which is a different proposition. We felt we had an obligation. It so happened we felt they were good candidates.

...

Q. Perron, Legacy, Roulston and Nerpin were paid less than the other three more experienced people?

A. Correct.

Up to a point, there is a measure of validity in Mr. Leathley's testimony. There is little doubt that he hired four persons who had been employed on a

temporary basis in construction work at the Hemlo site *in part* because they knew both the area and some of the people who were to work the mine. It is, however, clear to me that age ~~also~~ entered as a consideration of those who were to be hired. My reasons for so finding are based on the following:

1. The four who had worked during the construction phase at the Hemlo project were not assured a position with the security detail. Rather, they were, according to Messrs. Leathley, Barrie and Highcock, afforded an opportunity to be judged under the interview system described above. In that regard, *the four were to be afforded no preference.*
2. Yet, when the interview forms completed by Mr. Leathley for the three remaining candidates are considered, the facts certainly give rise to the inference that more was being sought than individuals who had previously worked at the mine site. Specifically, Mr. Leathley also was seeking young and trustworthy persons. A summary of Mr. Leathley's comments relating to each of the three follow:

Roger Perron - Under the heading: Can he do the job? Mr. Leathley stated that Mr. Perron met only minimum job standards. For experience, Mr. Leathley said Mr. Perron had some related work. As to Mr. Perron's motivation, Mr. Leathley stated that he didn't know. Under the heading of leadership, Mr. Leathley checked the box: "reluctant to accept leadership." His overall assessment of Mr. Perron was that he met most, but not all of the requirements for the position.

Rick Roulston - This candidate scored considerably higher, according to Mr. Leathley's interview sheet, than Mr. Perron. Except for three categories, he was scored as highly as Mr. Morin. Those categories related to education, experience and leadership. Mr. Leathley further noted that Mr. Roulston had "no experience in this setting."

Mr. Roulston was interviewed slightly more than two weeks after Mr. Morin. Mr. Leathley concluded that Mr. Roulston "meets some but not all of the requirements for the position." This was a lower category than the conclusion reached concerning Mr. Morin

where Mr. Leathley stated that all of the normal requirements of the position were met.

Having said that Mr. Roulston did not meet all the normal requirements for the position, and although he scored higher than Mr. Perron, Mr. Leathley urged that an offer of employment be made. In doing so he stated on the interview form: *"Rick seems a good candidate to work with an older more experienced man. Seems a good type of person. Should be hired."*

Cheri Legacy - This candidate fell somewhere between the ranking given Mr. Perron at one end and that received by Mr. Roulston. She clearly did not have the higher rating given Mr. Morin. Like Mr. Roulston, she received what could be called marginally satisfactory ratings in education and experience. She was given an unknown rating for leadership. And, her weak points noted by Mr. Leathley included limited experience and perhaps a measure of immaturity.

3. Contrary to what Mr. Barrie said, the fact is that the four were not treated in the same way. They were not all young and single and inexperienced. I refer specifically to Mr. Merritt, who at the time of hire was 44 years old and married. Mr. Merritt was deemed an experienced member of the security team and he was paired with Mr. Roulston.

4. There remained two positions vacant after the four were hired. Now consider who filled those positions: Mr. Hales, 35 years old, married, with security experience, was hired and paired with a relatively inexperienced person, Bruce Nerpin, 23 years old. The means for pairing of the kind sought by Mr. Leathley was complete. Yet, Mr. Nerpin was not one of the four who had previously worked at the mine site. How could his qualifications be considered superior to those of Mr. Morin? Mr. Nerpin had had only about three years of security experience, none of which was in a mine setting. It should be further noted that in his application for employment, Mr. Nerpin provided not only his date of birth, but also his marital status.

The evidence supports the charge made by Mr. Morin that Hemlo, Mr. Leathley, and Mr. Barrie did indeed recruit a security staff using age as an

element for choice. More particularly, four of the eight security positions were reserved for young persons, three of whom happened to have had some experience in temporary work during the construction phase at Hemlo.

Mr. Morin, in fact, was not considered for any of the four positions occupied by the younger persons. His interview with Mr. Leathley was one which resulted in Mr. Morin being placed in a category because of his age, namely, that of an experienced security officer. Yet, Mr. Morin was prepared and willing to take a lesser paying security position, if such had been offered to him. But, this was not to be. It was as Mr. Barrie described in his telephone conversation with Mr. Morin: The "old guy-young guy" routine was a policy of the company in hiring its Hemlo security force and, as such, it foreclosed Mr. Morin from employment.

This was overt discrimination within the meaning of section 4(1) of the *Human Rights Code*. There was discrimination in employment violative of the Code when age was used as a basis for determining job qualification. I can come to no other conclusion. In this regard, I fully accept the fact that there was no "malice" on the part of any of the Respondents to discriminate against Mr. Morin on the basis of his age. However, what was said by Professor Cumming in *Cameron v. Nel-Gor Castle Nursing Home and Marlene Nelson, 5 C.H.R.R. D/2170 (1984)*, at 2189, is appropriate here:

The onus is upon the Commission and the Complainant to establish a *prima facie* case of discrimination in contravention of subsection 4(1) and section 8 of the Code.

The Complainant, Cindy Cameron, is entitled to equal treatment with respect to employment without discrimination because of her handicap. The word "discrimination" implies a comparison. The applicant for employment is worse off, by not getting the position of employment, than she would have been if there had been no discrimination against her. More specifically, she is worse off than someone else in a comparable situation against whom there has been no discrimination. *Post Office v. Crouch (1974) 1 All Eng. Rep. 229* per Lord Reid at 238. "Discrimination" in the context of subsection 4(1) of the Code means the act of making a distinction against, or in favour of, a person based upon the group, class or category ("race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences,

marital status, family status or handicap") to which that person belongs, rather than on individual merit. *Courtney v. The National Cash Register Co.*, 262 N.E. 2d 586 (1970) per Burton, J.

Discrimination in respect of employment on a ground prohibited by subsection 4(1) singles out the victim for treatment on the basis of that factor. Ms. Cameron's application for employment must be considered on the merits, not on the basis of a factor prohibited by the *Code*. There is no dispute on the evidence that Ms. Cameron would have been hired as a nurse's aid at Nel-Gor, but for the fact of her handicap, and that the Respondent, Mrs. Nelson, denied her employment solely because of such handicap.

Cindy Cameron has a "handicap" within the meaning of [the *Code*]. She applied for a position of employment at Nel-Gor, which position was available at the time. She was not hired for the position, and the only reason she was not hired was "because of (her) handicap" as defined by [the *Code*].

*Prima facie*, there is a breach of subsection 4(1). *Prima facie*, Ms. Cameron has been denied her right to equal treatment without discrimination, because of her handicap. *Prima facie*, the Respondent Mrs. Nelson, in contravention of section 8, has done directly an act that infringes a right protected under Part 1 of the *Code*.

The Respondent, Mrs. Nelson, believed that Ms. Cameron would not be able to lift patients, or at least lift patients without exposing them to greater risk than otherwise, because of her handicap. There was no malice, hatred or ill-will on the part of Mrs. Nelson. She was acting with subjective good faith, that is, she honestly believed that Ms. Cameron's handicap rendered her less capable than a person without such a handicap in performing the essential duties as a nurse's aid.

Respondents argue that the absence of "malice" means there can not be a breach of the *Code*, but I disagree. The employer's good faith is not relevant to the initial determination of whether or not there is a *prima facie* breach of Part 1 of the *Code*. It is enough to constitute a *prima facie* breach if the employer intends to "infringe or do directly or indirectly, anything that

infringes a right" under Part I. "Intention" must be separated from "motive" which goes to the reason for doing the intended act . . .

Clearly, Mrs. Nelson intended her act of discrimination toward Ms. Cameron. Clearly, her motive was benign in that she did not think Ms. Cameron would be able to perform her duties as an employee satisfactorily.

In the matter before me, the facts demonstrate that age was used as a specific criterion in the pairing of senior security officers. Mr. Morin was placed in the senior category and deemed ineligible for the lesser paying security positions. In my view, he was deemed ineligible solely because of his age. If Mr. Morin's age had been put aside, if he had been treated the same way as, for example, Mr. Nerpin who never before his application to Noranda had worked at Hemlo, it is clear that Mr. Morin would have been awarded a security position.

It follows, as I stated, that there was a breach of subsection 4(1) by the Respondents, and that they are in contravention of section 8, for they have done directly an act that infringes Part I of the Code.

Commission Counsel argued that the same underlying facts demonstrate a violation of subsection 10(1) of the Code: Four of the security personnel positions required that applicants were to be inexperienced. To Mr. Leathley, who equated experience to age, this meant that inexperienced persons were necessarily young. The qualification of inexperience is not discrimination on a prohibited ground within the meaning of section 10(1) of the Code. However, on the facts, the necessary effect of the criterion of inexperience precluded experienced, and that meant older persons from being considered for the available positions. To that extent, a violation of the Code has occurred unless the Respondents can assert a defence under section 10.

Again, referring to *Cameron v. NelGor Castle Nursing Home, supra*, Professor Cumming discussed the defence which might be asserted in the matter before me. At D/2179, he stated:

Finally, it seems clearly implicit to section 10 of the new Code that the onus falls upon the employer to bring himself within the exceptional situation constituting a defence, also being that

approach reached by the evolution of the case law under the old Code.

As discussed in *Rand v. Sealy Eastern Limited, Upholstery Division* (1982) 3 C.H.R.R. D/938, paragraph 10(a) of the new Code provides the employer with a defence "where . . . the requirement . . . is reasonable . . . in the circumstances." The stated legislated standard is "reasonable." An employer who could establish that the employment requirement was reasonable in terms of the needs of his business (for example a store that was open on Saturdays) would have to go further and establish as well, that she could not accommodate a particular employee whose creed prevented her from working on Saturdays.

That is, the "reasonable . . . in the circumstances" standard of section 10 of the new Code embraces two facets: The employer must show not only that there is an objective real need (it is "reasonable") for the general employment requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in "the circumstances," it is not "reasonable" to be able to do so) by an accommodation of the particular employee. (Alternatively, the employer would have a successful defence if she could show that while reasonable accommodation was possible, it was offered and refused.)

At no point did the employer clearly explain why it needed "inexperienced" security personnel. I cannot even infer from the evidence that the integrity of the command structure dictated a paired combination where a senior person was in charge and another, an "inexperienced" person by his/her position understood that she/he was expected to follow orders. Nor can I infer that the Company intended to develop its own educational programme by using "inexperienced" security personnel as apprentices of a sort. Yet, in either event, there was no indication that Mr. Morin was incapable of following orders, or that because he was older than the four "inexperienced" persons that he was unable to learn any new program or procedure.

If anything, the evidence is quite to the contrary: Mr. Morin seemed to delight in learning and broadening his horizons. And, if given the opportunity, he seemed at the time more than willing to make Hemlo his

home. After all, as Mr. Morin pointed out, he had for many years made Northern Ontario his home. In the result, therefore, I am compelled to the conclusion that the Respondents also breached section 10 of the Code for the reasons stated.

## ORDER

The complaint in its essential parts having been sustained, I come now to the matter of remedy. My authority for granting remedies derives from section 40 of the Code. In that regard, I turn to the matter of what should be done to ensure compliance with the Code in the context of the violations found. In my view, the Respondent Corporation must be ordered to do the following:

1. Instruct its hiring personnel not to solicit information from job applicants either in writing or in interviews concerning their age within the meaning of section 4(1) of the Code.
2. Instruct job applicants to the extent practicable not to provide information concerning their age within the meaning of section 4(1) of the Code.

Next, there is the matter of monetary compensation to Mr. Morin for the loss of income resulting from not being offered a lesser paying position as a security officer. The evidence is uncontradicted that Mr. Morin was unemployed until July 1, 1985. It is a conservative view that he would have started work on or about February 1, 1985 but for the discriminatory acts of the Respondents. Taking the point of greatest difference between the so-called senior and junior security positions there was a variance of about \$4,500 annually. Over a period of five months, Mr. Morin lost income in the amount of \$10,000.00.

Mr. Drmaj, for purposes of this case only and with the clear understanding that no precedential value is to be derived therefrom, indicated that the Corporate Respondent would assume responsibility for any damages assessed should a violation be found and a monetary award issued. I accept this.

By way of special damages for lost income, the Corporate Respondent will pay to Mr. Morin the sum of \$10,000.

Lastly, there is the element of general damages. Section 40(1)(b) of the Code provides: "[W]here the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish." In *Cameron v. Nel-Gor Castle Nursing Home*, *supra*, Professor Cumming stated at D/2198:

An inherent, but separate component of the general damage should reflect the loss of the human right of equality of opportunity in employment. This is based on the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers.

There can be little question that Mr. Morin suffered considerable mental anguish resulting from the violations found. I accept the point made by Mr. Drmaj that Mr. Morin had already had a number of rejections for employment by the time his application was turned down by the Corporate Respondent. There is little doubt in my mind that Mr. Morin was vulnerable. He was a highly skilled older worker seeking employment after having left a job demanding the exercise of significant responsibility. Moreover, Mr. Morin, a person used to working, was willing to take even the position of a junior security officer at Hemlo after having applied for and having been rejected for the position of Security Co-ordinator for the entire Hemlo operation.

But, isn't this precisely a reason for the civil right protection against age discrimination in employment? Doesn't the Code recognize the enormous hurt that can attend older workers who are denied employment, after having worked most of their adult lives, solely because they are older workers, without regard for their individual capacity? And, isn't this precisely what Mr. Barrie, Mr. Morin's point of contact with the Corporate Respondent, spoke to: The reason for not offering Mr. Morin a position was the "old guy-young guy routine."

I said that Mr. Morin was vulnerable during the period leading up to the

application for employment at Hemlo. I did not say that he was depressed. Indeed, his actions, attested to by Donald Stewart, Fire Chief at Elliot Lake, were those of a mature individual, able to take rejection and still move forward seeking employment.

What happened to Mr. Morin after the denial of employment conveyed by Mr. Barrie was quite another matter. In effect, Mr. Barrie said the denial was not based on a measure of Mr. Morin's skill and ability. Rather, it was based solely on the fact of his age. The company had employed its quota of older workers. The remainder of the security staff would consist of younger workers. And this excluded Mr. Morin.

Chief Stewart, Mr. Morin and his wife all testified to the hurt that was felt, to the depression that followed and the debilitating overall effect on the Complainant.

A question was raised as to whether the hurt inflicted on Mr. Morin was done "wilfully or recklessly" within the meaning of section 40(1)(b). Professor Cumming in *Cameron v. Nel-Gor Castle Nursing Home, supra*, at D/2198-2201, addressed the point, and I accept both his rationale and his conclusions. The evidence is that the Respondents knowingly and deliberately discriminated against Mr. Morin on the basis of age. In that sense, they were wilful within the meaning of section 40(1)(b). Yet, in so stating, I emphasize that there is a considerable difference between a knowing or deliberate violation and malice. Not for a moment do I impute malice to any of the Respondents.

In my view, the mental anguish suffered by Mr. Morin as a direct result of the wrongs done was substantial. In this regard, compensation in the amount of \$2,000 shall be paid to Mr. Morin by the Corporate Respondent.

It will be noted that I have not awarded interest on any of the amounts ordered to be paid. My reasoning in this regard is found in the *Interim Award* issued in this matter on May 25, 1988. At pages 13 to 14 of that Award, I stated: "There has been undue delay [in bringing these proceedings] in the sense that a great deal of time has passed which the Commission either has not or cannot explain. There is little doubt that the Respondents have been inconvenienced because of that delay.... All of these points will be taken into consideration... in fashioning a remedy." The Respondents at all points were prepared and willing to proceed to

hearing. They are not to be punished for delay, as noted above, by the imposition of interest payments.

IT IS SO ORDERED.

DATED THIS 17<sup>th</sup> DAY OF MAY, 1989 AT TORONTO, ONTARIO.

A handwritten signature in black ink, appearing to read "D.J. BAUM". It is written in a cursive style with some loops and variations in letter height.

Dr. D.J. Baum, Board of Inquiry

